Editor's Note: Reconsideration denied by orders dated February 25, 1997 and May 21, 1997.

RAY ROTHBARD, ET AL.

UNITED STATES V. RAY ROTHBARD

IBLA 94-259, 95-79 Decided December 17, 1996

Appeals from a decision of the Oregon State office, Bureau of Land Management affirming a combined Notice of Noncompliance and Notice to Cease and Desist mining operations with respect to ORMC 113385 et al., and a decision of Administrative Law Judge Rampton declaring mining claims ORMC 113384 et al. null and void.

Decision in IBLA 94-259 affirmed in part and vacated in part; decision in IBLA 95-79 affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Plan of Operations

   Pursuant to 43 CFR 3809.3-2, a notice of noncompliance was properly issued to mining claimants when they failed to file a plan for actual mining operations, failed to properly reclaim disturbed areas, and failed to conform their operations to an approved plan then in effect. Nonetheless, BLM lacked authority to issue a notice to cease and desist mining operations under 43 CFR 3809.3-2, because such action required an appropriate court order, which had not been obtained.

2. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Determination of Validity--Mining Claims: Locatability of Mineral: Generally

   A deposit of sand was properly found to be a common variety of mineral material rather than a locatable mineral under 30 U.S.C. § 611 (1994) when a widespread availability of other deposits of sand equally suitable for use in construction was shown to exist; failure by the mining claimant to distinguish between the value of sand he claimed and other similar deposits in the area further indicated that the mineral material in question was a common variety.

3. Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Determination of Validity--Rules of Practice: Appeals: Dismissal

An alleged failure to maintain mining claims in conformity to law while an appeal of a mining contest decision invalidating the claims is pending does not moot the appeal if the claims are subject to relocation and the miner declares an intention to relocate them.

APPEARANCES: Ray Rothbard, Bend, Oregon, pro se; Marianne King, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Ray Rothbard and Robert L. Coats have appealed from a December 1, 1993, decision of the Oregon State Office, Bureau of Land Management (BLM), affirming a combined Notice of Noncompliance and Notice to Cease and Desist (notice) issued by the Prineville (Oregon) District Office, BLM, with respect to mining operations conducted on Rothbard's claims, ORMC 113385 through ORMC 113387 and ORMC 113393. The Board docketed that appeal as IBLA 94-259. Rothbard has also appealed from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., declaring mining claims ORMC 113384 through ORMC 113387 and ORMC 113391 through ORMC 113393, null and void for want of minerals locatable under the mining laws. That appeal was docketed by the Board as IBLA 95-79. Because of the related nature of these two appeals, they are consolidated for decision, but are separately discussed.

THE NOTICE APPEAL, IBLA 94-259

Rothbard and his daughter Jamie located the Rainbow mining claims, nos. 4-6, and no. 12, ORMC 113385 through ORMC 113387 and ORMC 113393, on February 14 and 28, 1989. Despite BLM's warning that the material Rothbard purported to locate, concrete sand and mason sand, was not locatable, he proceeded to remove sand from the claims under a plan of operations approved by BLM. Rothbard's operator, Robert Coats, removed 46,000 yards of sand, for which he paid Rothbard a royalty of 50 cents per cubic yard, before BLM contested the validity of the claims.

The notice was issued as a result of a mineral examiner's visit to the claims on July 20, 1993, during which it was determined that Coats, the operator, had not filed a plan of operations as required by 43 CFR 3809. The notice found that approximately 10 acres had been disturbed by the mining operation, 8 of which were outside the area covered by Rothbard's plan of operations for Rainbow Claims 5, 6, and 12. It was also determined that disturbance outside the approved mining area exceeded 5 acres for which no notice or plan of operations had been submitted or approved.

BLM found Rothbard and Coats in noncompliance with 43 CFR 3809.3-2, for failure to have an approved plan of operations for the area mined in sec. 7, T. 21 S., R. 11 E., Willamette Meridian (WM), and ordered immediate cessation of operations on lands not covered by an approved plan of operations in secs. 7 and 18, T. 21 S., R. 11 E., and secs. 12 and 13, T. 21 S., R. 10 E., WM. BLM then required: (1) submission and approval of a

plan of operations pursuant to 43 CFR 3809.1 for areas not presently under a plan; (2) satisfactory reclamation of the entire area outside Rothbard's plan of operations; (3) modification of the existing plan of operations for Rainbow Claims 5, 6, and 12, to name the operator and commit him to the plan (43 CFR 3809.1-5(c)(1)); and (4) reclamation of areas within Rothbard's plan of operations consistent with mining plan specifications and 43 CFR 3809.

Rothbard and Coats responded to BLM by letter dated August 16, 1993, arguing that their alleged failure to identify the operator and remain within the area described in an approved plan of operations resulted from a misapplication of the regulations and claim descriptions by BLM. This response, treated as an appeal by the BLM State Office, was denied on December 1, 1993, and BLM's notice was upheld with modifications added by the State Director. These modifications included a requirement that: (1) the operator submit a plan of operation pursuant to 43 CFR 3809.1, including a reclamation plan; (2) he include a detailed map of all existing and planned disturbances; and (3) provide a description of proposed mining. The State Director also required the operator to obtain written approval and acceptance by the Prineville District Authorized Officer of the Plan modification. Rothbard and Coats appealed the State Director's decision on December 27, 1993.

On October 11, 1994, BLM filed a motion to dismiss IBLA 94-259 because Judge Rampton had declared the mining claims at issue herein null and void, rendering the instant mining plan appeal moot. Appellants opposed the motion, noting an appeal from Judge Rampton's decision had been filed with this Board, so that his decision lacked finality. While we affirm Judge Rampton's decision herein, we must still deny BLM's motion because the scope of the notice here under review went beyond mining operations to encompass continuing reclamation concerns.

In their statement of reasons (SOR), Rothbard and Coats argue the notice was improperly served and lacked a proper designation of the mining claims involved. We reject those assertions and other arguments of a similar nature, because there has been no showing of prejudice from any claimed procedural irregularity. Other contentions presented on appeal are that: (1) An operator is not required under the regulations to file a separate plan of operations, and it was sufficient that BLM was informed of the change in operators; (2) BLM was notified about the area to be disturbed in the plan of operations by reference to the claims as originally filed, and their later amendment is therefore irrelevant since they were marked on the ground and BLM should have been able to learn which lands were being mined from all available documents on file; and (3) that Coats filed a reclamation plan with the State that was in compliance with BLM reclamation requirements, and reclamation was accomplished thereunder. Appellants state that ongoing reclamation has been accomplished by filling an excavated area with overburden that will be seeded when stockpiled material and overburden is removed. They also state that BLM has refused to give permission to reclaim (SOR at 4).

In a letter to BLM dated November 25, 1991, Rothbard agreed to BLM's conditions of approval for the mining plan. Therein, he stated that he planned to mine 2 acres at a time, that reclamation of the first 2 acres would be immediately done, and no more than 2 acres would be disturbed at any time. Nonetheless, an excavation map (exhibit 1 to the State Director's decision) completed after the notice was issued shows 11.7 acres of unreclaimed disturbance remains on the claims.

Surface management regulations at 43 CFR Subpart 3809 were promulgated to prevent undue degradation of the public lands pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, (FLPMA) 43 U.S.C. § 1732(b) (1994). Differential Energy, Inc., 99 IBLA 225 (1987). Departmental regulation 43 CFR 3809.1-5 provides that a plan of operations "must be filed in the District Office [BLM]." Such a plan is to include "[t]he name and mailing address of the operator" (3809.1-5(c)(1)), a "map * * * or sketch showing * * * access and size of each area where surface disturbance will occur" (3809.1-5(c)(2)), the "name [and serial numbers] of the mining claim(s)" (3809.1-5(c)(3)), "[i]nformation sufficient to describe or identify the type [and period] of operations proposed" (3809.1-5(c)(4)), "[m]easures to be taken to prevent unnecessary or undue degradation and measures to reclaim disturbed areas" (3809.1-5(c)(5)), and "[m]easures to be taken during extended periods of nonoperation" (3809.1-5(c)(6)). At any time, an operator may modify a plan or BLM may request that he do so. 43 CFR 3809.1-7(a). A change of operator "shall be promptly reported" to BLM (43 CFR 3809.1-5(c)(1).

[1] Under 43 CFR 3809.3-2, a notice of noncompliance may be issued by BLM for failure to file a mining plan of operations, failure to properly reclaim disturbed areas, and failure to conduct operations in accordance with an approved plan of operations. In the notice here under review, BLM found that Rothbard and Coats failed to modify an approved plan of operations to show the actual location of their mining operations, did not notify BLM of the change in operators, and failed to reclaim the area in accordance with the approved plan. While BLM could have identified the mining area by close analysis of the file, the record is clear that the mining plan was never amended to show modifications were made to the claim descriptions. More importantly, Coats was not identified as the operator nor was he committed to the BLM approved plan of operations. While Rothbard obtained an approved mining plan, Coats failed to conduct operations in accordance with that plan, and reclamation was not accomplished in conformity thereto. The approved plan required continuous reclamation, including seeding, after two acres had been mined. The record shows that over 11 acres were mined without reclamation. Appellants now state (SOR at 4) that seeding will be done in the future, thereby admitting that it has not been done as required by the approved plan.

If the contested mining claims were valid, the simple solution would be to rewrite the Rothbard plan of operations to require a mining and reclamation plan to be submitted by the operator Coats. This was the remedy required by the State Director and was within his scope of authority

to require under 43 CFR 3809.1-7. Accordingly, we affirm this aspect of BLM's notice. Nonetheless, because we also affirm Judge Rampton's decision holding the claims null and void, no action is necessary to implement the Director's finding requiring a new mining plan of operations to be filed. With respect to the part of the notice ordering appellants to cease and desist operations, however, we find no such authority in the regulations. Departmental regulation 43 CFR 3809.3-2 requires that, in order to enjoin operations on a mining claim, BLM must first obtain an appropriate court order. We must vacate this latter provision of the notice, no such order having been obtained. Except as so modified, the State Director's decision is affirmed.

THE MINING CONTEST, IBLA 95-79

In the mining contest against the Rothbard claims, Judge Rampton declared the Rainbow nos. 3-6 and nos. 10-12 placer mining Claims, ORMC 113384 through ORMC 113387 and ORMC 113391 through ORMC 113393, null and void because the mineral deposit purportedly discovered on the contested claims is a common variety deposit not locatable under the mining laws. His opinion, which is adopted as the opinion of the Board for reasons explained hereafter, is attached as Appendix A to this decision.

BLM initiated the contest after a mineral examination of the claims by Gerard E. Capps, assisted by Larry Chitwood. A hearing was conducted June 27 through 28, 1994, at Bend, Oregon. Judge Rampton evaluated the testimony and evidence presented on behalf of the Government at the hearing and concluded that BLM had established a prima facie case that the black sand and gravel deposit being mined by Rothbard is a common variety deposit, "containing material which is similar to the black sand and gravel that is found throughout the La Pine Basin, which is used for common variety uses, and which does not command a higher price for any use" (Appendix A at 5). He then ruled that Rothbard failed to overcome this prima facie case by a preponderance of the evidence. Judge Rampton determined that Rothbard had not demonstrated that the Rainbow deposit possessed unique properties or that it had special value. He concluded from the evidence presented at the hearing that the "Rainbow sand is used for ordinary purposes, does not command a higher price, and is not less costly to mine and process" (Appendix A at 10).

The issue here to be decided is Rothbard's contention that Judge Rampton incorrectly found Rothbard's sand was a common variety. In an SOR filed in support of his appeal of the mining contest, Rothbard revisits arguments presented at the hearing and declares that a different conclusion was warranted, disagreeing with Judge Rampton's judgment of the weight to be given the evidence presented at hearing. The Department traditionally gives considerable deference to a Judge's findings on questions of witness credibility. If resolution of a case depends primarily on such findings, those findings will not lightly be set aside. State Director for Utah v. Dunham, 3 IBLA 155, 163 (1971). Judge Rampton, as the trier-of-fact, had the opportunity to observe witness demeanor as testimony was given and to

compare and weigh the testimony and exhibits. Our review of the record supports those findings by Judge Rampton that depend upon his judgment concerning the credibility of the witnesses at hearing.

[2] When the Government contests a mining claim, it assumes the burden of going forward with sufficient evidence to establish a prima facie case of invalidity. United States v. Anderson, 83 IBLA 170, 175 (1984), and cases cited therein. The testimony of a qualified Government mineral examiner that he has examined a claim and found it is not supported by discovery of a valuable deposit of a locatable mineral is sufficient to establish the Government's prima facie case. Id. While the Government may bear the initial burden, it is the claimant who is the ultimate proponent of the validity of his claim and, where a prima facie case of invalidity has been established, it is the claimant who bears the affirmative burden of refuting the Government's case by a preponderance of the evidence. See, e.g., United States v. Mineco, 127 IBLA 181, 187 (1993), and authorities therein cited. We agree with Judge Rampton's conclusions that a prima facie case of invalidity of the subject mining claims was established and that claimant Rothbard failed to rebut that case by a preponderance of the evidence. Moreover, Rothbard has not shown error in Judge Rampton's decision, which we affirm and adopt and attach hereto as Appendix A.

While section 1 of the Mining Act of May 10, 1872, as amended, 30 U.S.C. § 22 (1994), opens "valuable mineral deposits" to exploration and purchase by mining claimants, section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1994), declared deposits of common varieties of stone, sand, gravel, and certain other mineral materials were no longer valuable mineral deposits under the mining laws. The latter statute provides that the term "common varieties" does not include "deposits of such materials which are valuable because the deposit has some property giving it distinct and special value." BLM contends that the layer of black sand mined by Rothbard is no different than similar sand found elsewhere in the La Pine Basin. Rothbard disagrees and requests that we find his "Rainbow claims possess special and distinct properties that give the material a special and distinct value in that the material commands a higher price in the marketplace" (SOR at 21). Rothbard argues that the Rainbow material "can be produced with less processing", "may be used, without blending, for State spec. material," and "far exceeds [relevant technical] standards * * * and simply requires screening for processing." Id. Judge Rampton considered and refuted Rothbard's assertions regarding the special characteristics of the Rainbow material. He also concluded that even if the Rainbow deposit possessed one or more unique properties, Rothbard failed to show those properties gave the deposit a distinct and special value. See Appendix A at 6-8.

BLM's geologists testified that the Rainbow deposit is similar to the possibly billion cubic yards of sand in the La Pine basin (Tr. 179, 189-90, 228). The record shows that the purposes for which the Rainbow material is mined may be satisfied by those other sands. Deposits of sand and gravel suitable for construction purposes, which may be superior to other deposits

but which are "used only for the same purposes as other widely available, but less desirable deposits of sand and gravel are, nonetheless, a common variety of sand and gravel." United States v. Guzman, 18 IBLA 109, 125, 81 I.D. 685, 692 (1974).

Defining the distinction between common and uncommon varieties in the context of a contest, the Department has held that the 1955 statute requires comparison of the mineral deposit at issue with other deposits of such minerals generally to determine if it has properties giving it a "distinct and special value." United States v. United States Minerals Development Corp., 75 I.D. 127, 132 (1968). The 1955 Act requires an uncommon variety to meet two criteria: the deposit must have (1) a unique property that (2) gives the deposit a distinct and special value. Id. at 134. The special value may be for some use to which ordinary varieties of the mineral cannot be put; or it can be for uses to which ordinary varieties of the mineral can be put if the deposit has some distinct and special value for such use. Id. We find the qualities advocated by Rothbard lack the necessary distinction to qualify the sand for location under the 1955 Act. See Appendix A at 8.

Rothbard argues that Judge Rampton erred when he failed to apply the marketability test in this case, and asserts that the prudent man test is not applicable. Judge Rampton did not, however, apply the prudent man test, which is used to determine whether a discovery exists. He properly stated and applied the standard for distinguishing between common and uncommon varieties of mineral materials, since the issue before him was whether sand and gravel on the Rothbard claims was subject to location. See Appendix A at 4. The fact that a mine might operate at a profit does not mean that the mineral has a distinct and special value. United States v. Multiple Use, Inc., 120 IBLA 63, 83 (1991). If the material on the claims is not locatable, a discussion of marketability is moot.

If a deposit is alleged to be of an uncommon variety although it is used for the same purposes as common variety mineral material, the only practical criterion for determining whether the deposit has a distinct and special value is whether the material commands a higher price in the marketplace. United States v. United States Minerals Development Corp., supra. The court in McClarty v. Secretary of the Interior, 408 F.2d 907, 909 (9th Cir. 1969), recognized that, for a variety to be uncommon, it must produce a substantially greater profit to the claimant than would otherwise be the case. Rothbard argues that while Coats sells his product for the same price as his competitor Bendy Ready-mix, his production cost is half that of his competitor due to the character of the Rainbow deposit. Judge Rampton addressed the price question in his decision and concluded that neither Rainbow concrete sand nor Rainbow mason sand commanded a higher price than that of other sands. See Appendix A at 8-9. Judge Rampton found that the evidence showed that while some sand was sold at a higher price, many more sales were made within the same range of prices as competing sands. Rothbard has failed to show error in Judge Rampton's decision of this issue. Consequently, it is concluded that the Government

established a prima facie case of invalidity of the mining claims by showing that the claims were not supported by discovery of a valuable deposit of locatable mineral, and that Rothbard failed to rebut the Government's case. See Appendix A.

[3] Finally, on November 18, 1996, while this appeal was pending, BLM moved to remand the case files to allow issuance of a decision that the claims were void because they had not been maintained in conformity to 28 U.S.C. § 28f (1994), which requires certain fee payments or applications for waiver thereof. It is true that failure to maintain mining claims in conformity to law during the pendency of an appeal of a decision determining the validity of such claims may render the appeal moot. See, e.g., United States v. Mineco, 130 IBLA 314, 318 (1994). Nonetheless, we recognize that, as appellant Rothbard's response to BLM's request to remand suggests, an appeal might remain viable if an adverse decision thereon would apply to subsequently relocated claims.

The Board has characterized mining claim contests as being quasi in rem. See, e.g., Robert D. McGoldrick, 115 IBLA 242, 244 n.3 (1990); United States v. Oneida Perlite Co., 57 IBLA 167, 191, 88 I.D. 772, 785 (1981): Such proceedings determine rights flowing from a specific location (the rem) rather than rights personal to claim locators. Since, in addition to denying there has been a failure to comply with fee payment requirements, Rothbard indicates he would relocate these claims if they were declared null and void for failure to either pay required fees or obtain exemption therefrom, his appeals are properly adjudicated on their merits because the issues raised by him will persist unless a decision on the question of claim validity is issued now; clearly, the question of claim validity is not moot under such circumstances. The request for remand is therefore denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from in IBLA 94-259 is affirmed in part and vacated in part, and the decision appealed from in IBLA 95-79 is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

UNITED STATES OF AMERICA,	:	ORMC 113384 thru ORMC 113387
	:	ORMC 113391 thru ORMC 113393
Contestant	:	
	:	Involving the Rainbow #3, #4, #5,
v.	:	#6, #10, #11, and #12 placer
	:	mining claims situated in
	:	Sections 7, and 18, T. 21 S.,
	:	R. 11 E., and Sections 12 and 13,
	:	T. 21 S., R. 10 E., Willamette
	:	Meridian, Deschutes County,
	:	Oregon
	:	
RAY ROTHBARD	:	
JAIME ROTHBARD,	:	
	:	
Contestees	:	

DECISION

Appearances: Marianne W. King, Office of the Regional Solicitor, Portland, Oregon, for contestant;

Raymond G. Rothbard, Bend, Oregon, pro se.

Before: District Chief Administrative Law Judge Rampton

This case was initiated by contestant, by and through the Bureau of Land Management (BLM), United States Department of the Interior, which filed a compliant charging that the above-captioned placer mining claims are null and void because "[t]he mineral material found within the limits of the claims is not a valuable mineral deposit under Sec. 3 of the Act of July 23, 1955, (60 Stat. 367; 30 U.S.C. 601)." Contestee filed an answer denying this charge.

A hearing in the matter was held on June 27 through June 29, 1994, in Bend, Oregon. The parties filed posthearing briefs in support of their respective positions. Having reviewed and considered all evidence and briefs, and for the reasons set forth below, I conclude that the above-captioned mining claims are null and void because the mineral deposit on the

contested claims, a sand and gravel deposit, is a common variety deposit which is not locatable under the mining laws.

Statement of Facts

Contestee Ray Rothbard located the contested claims on February 28, 1989 (Complaint and Answer). The claims are located in the La Pine Basin, Oregon, an area of approximately 600 square miles. The Basin is surrounded by numerous volcanic features including Crater Lake, the remnant of Mount Mazama, to the southwest, Newberry Crater to the east, and Mount Bachelor to the west (Tr. 52, 56, 58, 67, 183; Exh. G-10).

The claims are situated three-quarters of a mile east of the Little Deschutes River, on a broad fairly flat bench 20 feet higher than the River. Paulina Creek, running down from the Newberry Crater, enters the Little Deschutes River immediately south of the Rainbow #6 claim (Tr. 97, Ex. G-10).

The claim area is covered with 3 to 4 feet of ash-fall from the eruption of Mount Mazama 6,900 years ago. Underlying the white ash is a 0.5 to 1.0 foot thick fine black clay/silt layer suggesting that at the time the ash was deposited, a lake may have existed in this area. Below the ash and clay is black, unconsolidated sand and gravel. Underneath the black sand and gravel lies silt and clayey silt sediments from an ancient lake bed (Tr. 93, Exs. G-8, G-10).

The layer of black sand and gravel is found throughout the La Pine Basin at depths ranging from 6 to 24 feet (Tr. 60-65; Exs. G-8, G-9). The material is alluvial, consisting of materials washed down by glacial, rain, and other surface waters from the adjacent volcanoes and carried into the basin in large fans that have interacted and intermingled (Tr. 61-63, 69). Ancient rivers and streams have also moved and blended these alluvial materials (Tr. 524-525).

The only minerals on the claims which Rothbard contends are locatable and valuable are concrete sand and mason sand (hereinafter collectively referred to as the "Rainbow sand") from the black, unconsolidated sand and gravel (Tr. 27-31). Pursuant to a plan of operations approved by BLM, Rothbard authorized Robert Coats to remove the Rainbow which he paid Rothbard a royalty of 50 cents per cubic yard (Tr. 327).

Gerard E. Capps, a BLM certified mineral examiner, conducted a validity examination of the contested claims and concluded at the hearing and in his mineral report are that the black sand and gravel deposit on the contested claims was a common variety deposit because the Rainbow sand was used and suitable only for ordinary purposes and because the deposit possessed no unique intrinsic property giving it a distinct and special value (Tr. 100-101, 168, 215, 228-230, 272, Ex. G-10). As part of the examination, Capps interviewed

Rothbard, Coats, and various concrete producers and purchases of aggregate to determine the price and market for concrete and mason sand and to compare Rothbard's sand and gravel deposit with other deposits in the area (Tr. 101-102, 203-211; Exh. G-10 at 6, 18-24). Capps determined that the Rainbow sand did not command a higher price than the price paid for concrete and mason sand and other sources (Tr. 204-206, 229, 296-297; Ex. G-10). He also determined that the costs of mining and processing the Rainbow sand was similar to the costs of mining and processing sand from other deposits in the area (Tr. 226-227, 229, 272, 296-297; Ex. G-10).

When Capps interviewed Rothbard, he asked Rothbard to identify his discovery points and the material being mined (Tr. 160-161). Rothbard identified stockpiled material as the material which Coats had been mining for use as concrete and mason sand (Tr. 160).

In July 1993, and in the presence of Rothbard, Capps took five samples of the Rainbow sand, samples RR-1, RR-2, RR-3A, RR-3B, and RR-4, using a backhoe (Tr. 119-120; Ex. G-10 at 6). In October 1993, Capps took additional samples in Rothbard's presence, samples RR-5, RR-6, RR-7, RR-8, and RR-9, using an auger rather than a backhoe because Rothbard could not provide a backhoe (Tr. 118-120, 123, 154; Ex. G-10 at 6). BLM witnesses acknowledged that backhoe samples are preferable to auger samples, entailing less risk of contamination by the ash which overlies the black sands (Tr. 386-386, 441). However, auger sampling is an accepted method of sampling and Capps followed standard sampling procedures to avoid contamination (Tr. 152-153, 191-192, 391).

At the time of sampling, Rothbard did not object to the location of any of the samples taken in his presence (Tr. 119-120). At the hearing, Rothbard did object to certain samples because they were taken in his absence (Tr. 119-120, 159-161, 184). Those samples included four samples from the stockpiles of the Rainbow sand (Tr. 119-120, 159-161), samples taken from sand and gravel pits which sell their sand in the same market in which the Rainbow sand is sold (Tr. 159, 190), nine samples taken by auger from other locations in the La Pine Basin (Tr. 180-181), and eight samples taken by backhoe in the Basin (Tr. 182-183).

Larry Chitwood, a U.S. Forest Service geologist and an expert on the geology of the La Pine Basin (Tr. 51-52, 56-58, 67), assisted Capps in selecting the Basin sites for the backhoe samples (Tr. 182-183). They located the sample sites near drill holes previously made to map the geology of the area as part of the La Pine Aquifer Management Study (Tr. 182-183). Chitwood co-authored and did the mapping for this study (Tr. 51-52, 56-58).

Rothbard also objected to the stockpile samples because he believed they might be unrepresentative of the deposit due to possible contamination from wind blown fines or other factors. His nonexpert belief is not supported by the evidence, as the expert mineral examiner, Capps, repeatedly testified that the stockpile samples were representative, having

been taken in accordance with standard procedures to account for the possibility for such contamination (Tr. 263, 380).

Rothbard further objected to the representativeness of the auger samples both because of the presence of water during sampling and because of the depth of the samples (Tr. 191-197). He contended that the samples showed excessive fines because the fines floated to the top of the water and because Capps sampled too deeply, beyond the zone of black sand being mined by Coats. Capps refuted these contentions, explaining that the dampness would not skew the sample results and that the black sands below the depth being mined by Coats were similar to those being mined (Tr. 191-197).

After comparing the test results for the Rainbow sand samples with the test results for the samples taken elsewhere, Capps concluded that the black sand and gravel deposits on the contested claims possessed no unique intrinsic property (Tr. 215, 228; Ex. G-10). Two other experts called by BLM agreed with this conclusion (Tr. 29, 33, 400, 419). The Rainbow sand is similar to sand found throughout the La Pine Basin (Tr. 83-84, 226). This similarity is consistent with the geology of the Basin; a fairly small basin with volcanoes surrounding it (Tr. 109, 179).

Discussion

BLM contends that the black sand and gravel deposit on the contested claims is a common variety deposit of sand and gravel. If BLM is correct, then the deposit is not subject to the mining laws and is therefore not locatable. See 30 U.S.C. § 611.

Rothbard disagrees, arguing that the sand and gravel deposit is an uncommon variety deposit. To establish that a deposit of sand and gravel is an uncommon variety locatable under 30 U.S.C. § 611: (1) there must be a comparison of the mineral deposit with other deposits of such minerals generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market or by reduced costs or overhead resulting in greater profit where the market price remains comparable to that of other sands. See United States v. Joseph R. Henri & Aletha Henri (On Judicial Remand), 104 IBLA 93, 97 (1988).

As has been well established, when the Government contests the validity of a mining claims, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which preponderates sufficiently to overcome the Government's case on those issues raised. United States v. Eva M. Pool, et al., 78 IBLA 215, 220 (1984).

A prima facie case that the mineral material is a common variety may be established by showing (1) that the mineral material is sand, (2) that the sand's price is similar to that paid for sand typically put to common variety use, (3) that the Government's witness has been unable to identify any special use for the mineral material commanding a higher price. United States v. Multiple Use, Inc., 120 IBLA 63, 82 (1991). Through the testimony of Capps, a certified mineral examiner, and the supporting testimony of Chitwood and others, BLM clearly established a prima facie case that the black sand and gravel deposit on the contested claims is a common variety deposit, containing material which is similar to the black sand and gravel that is found throughout the La Pine Basin, which is use for common variety uses, and which does not command a higher price for any use.

As more fully discussed below, Rothbard failed to overcome this prima facie case by a preponderance of the evidence. Rothbard first disputes the geological conclusions reached by BLM's experts. He argues that the Rainbow sands are not similar to any other material found in the La Pine Basin. He contends that the Rainbow sands are part of an alluvial fan deposit which overlies and is different from the ancient lakebed sediments found throughout the Basin. However, Rothbard presented no geological evidence to support this contention and the evidence overwhelmingly shows that the Basin is filled with similar alluvial fan deposits which overlie the ancient lakebed sediments.

Secondly, Rothbard argues that BLM's sampling of the claims and other sand deposits was flawed. His complaint that he was not present for some of sampling is unavailing, as he was provided the opportunity to and did point out his discovery points and the material being mined. His contention that the sampling are standard and acceptable. There is no reason to doubt the representatives of the results, except perhaps the results of sample RR-3A, which apparently consisted of overburden. This lone questionable sample does not materially effect the conclusions to be drawn from the sample results.

Rothbard points to the disparity in the results between the backhoe samples and the auger and stockpile samples as evidence of the unreliability of the latter. But Capps testified that the gradation and sand equivalent of all the samples was similar, supporting the reliability of all of the samples (Tr. 169, 177-178). Moreover, only some of the backhoe samples showed results more favorable to Rothbard. Most importantly, a mere disparity in results especially where the favorable backhoe results are in the minority, does not show that the results of the unfavorable samples are unreliable. Without some evidence of contamination or other impropriety, the proper conclusion to be drawn is that there is some variability in the Rainbow sands, which overall are similar to the sands found throughout the Basin.

Given this conclusion, Rothbard faces a steep uphill battle in attempting to prove that the Rainbow deposit has a unique property.

I.

Does the Rainbow deposit possess a unique property?

Rothbard argues that the Rainbow deposit has nine unique qualities. However, the evidence shows that the deposit possesses no unique properties.

First, Rothbard claims the sand is of uniform gradation with 98 to 100 percent of the material useable as concrete aggregate meeting State specifications. This claim is apparently based upon the opinion of Coats that the waste associated with mining the Rainbow sand is approximately 2 percent (Tr. 317, 326, 335).

His subjective opinion, however, is not supported by objective tests of the sand. BLM's test data show that there is excessive material passing the #200 screen and 1 percent limit on lightweight materials (Tr. 131; Ex. G-20). These materials must be removed to meet Oregon Departments of Transportation specifications. If these materials are removed, the waste on average would be approximately seven percent (Ex. G-20).

Moreover, the test results for the samples of black sand from other points around the basin shown that this material is superior to the Rainbow sand in terms of less waste (Tr. 187-189). To meet the State specifications, less than 2 percent of these materials would have to be removed (Ex. 20).

A second, and related property which Rothbard claims is unique is that there is a significantly lower waste factor associated with mining the Rainbow sands, thus minimizing the hauling costs of waste material and increasing profits. As previously noted, the Rainbow sands are inferior to the black sands throughout the La Pine Basin in terms of the amount of waste material.

A third, and another related, property which Rothbard claims is unique is that the Rainbow sand purportedly lacks deleterious materials, i.e., lightweights, friable particles, and excessive fines, thereby eliminating loss of product from excessive processing and permitting use of the sand without processing where grading is not required. As previously noted, and as indicated by Exhibit G-20, the amount of deleterious materials in the Rainbow sand is not extraordinary; in fact, the black sands throughout the La Pine Basin are superior to the Rainbow sand in terms of the amount of deleterious materials.

A fourth, and yet another related, property which Rothbard claims unique is that the Rainbow sand contains no oversize materials, thus allowing the deposit to be mined with only a Cat and loader, resulting in an advantage in mining costs over other sand deposits where crushers and screen plants are required. The only evidence of any competitor using a crusher and screening plant was Coat's testimony that the Horse Ridge pit did so. However, the Horse Ridge pit's primary focus is on mining crushed rock (Tr. 334). It

must crush and screen the crushed rock, with sand being merely a byproduct of this process (Tr. 334). In other words, the Horse Ridge pit operations are not appropriate for comparison and there is no other evidence to show that the Rainbow sand is somehow unique in terms of the amount of oversize materials.

Moreover, the Rainbow sands, contrary to Rothbard's contentions, are processed through a screening plant (Tr. 360-361). Because the screening plant and other processing equipment is not located on site with the pit, Coats must have two sets of a Cat and a loader, one at the pit and one at the processing site (Tr. 227). Thus, the costs of mining the Rainbow sands may actually be higher than that to mine other sands.

The fifth property which Rothbard claims is unique is that the Rainbow sand can meet State specifications for concrete aggregate without the need to blend it with other materials. There is evidence that some other sands being mined in the area were blended with other materials to reduce the percentage of lightweight materials to meet State specifications (Tr. 309, 352). However, no explanation was provided as to why these sands were blended, rather than washed, to reduce the percentage of lightweight materials. Whereas some sands are blended to meet State specifications, the Rainbow sand is washed to meet the specifications. More importantly, the black sands found throughout the Basin are similar and superior to the Rainbow sand and presumably would require no blending and less washing to meet State specifications.

Sixth, Rothbard contends that the Rainbow sand (unprocessed) is unique in that it far exceeds ASTM standards. In reality, the evidence shows that the Rainbow sand does not meet ASTM standards for gradation and deleterious materials without processing (Tr. 158, 162, 173, 285, 360; Ex. G-20). The evidence also shows that it is largely irrelevant that the Rainbow sand may far exceed some of the ASTM standards; the concern is whether or not it meets each of the standards (Tr. 135-136, 436).

Seventh, Rothbard contends that the deposit is unique because it is located adjacent to U.S. Highway 97, facilitating transportation of the sand to Bend, Oregon. The fact that the deposit is conveniently located next to a highway is a quality extrinsic to the deposit and may not, as a matter of law, be considered in determining whether the deposit has unique characteristics. See United States v. Henri, 104 IBLA 93, 98-99 (1988).

Eighth, Rothbard contends that the deposit is unique because stratification of the Rainbow sand in the deposit enables trucks to pick up material where it is pushed up by the Cat rather than having to haul the sand to a centralized location. This contention cannot be sustained, as sand is typically found in stratified deposits (Tr. 200). Moreover, the relationship between stratification and haul costs was not proven or apparent.

Ninth, Rothbard argues that the Rainbow sands are unique because his claims are located close to the base of the Newberry Volcano, where heavier materials are likely to have been deposited by Paulina Creek, while finer materials were carried further out into the middle

of the Basin. While Capps acknowledged that coarser/heavier materials would generally be found in greater abundance when moving from the center of the Basin towards the volcanoes, both he and Chitwood disagreed with Rothbard's argument. Chitwood stated that Paulina Creek was too small to have deposited such large quantities of black sands and that black sands derived from multiple sources (Tr. 74-75, 524-525). And, as previously noted, the evidence shows that the black sand throughout the Basin is similar to the Rainbow sand.

In sum, the Rainbow deposit possesses no unique properties.

II.

Assuming, arguendo, that the Rainbow deposit has one or more unique properties, do these properties give it a distinct and special value?

Assuming, arguendo, that the Rainbow deposit has one or more unique properties, Rothbard failed to show that those properties giver the deposit a distinct and special value. As previously noted, the distinct and special value must be reflected by the higher price which the material commands in the market or by reduced costs or overhead resulting in greater profit where the market price remains comparable to that of other sands.

As to the price of the Rainbow sand, Rothbard presented receipts for sales of less than 1 percent of the 46,000 cubic yards of sand which has been mined (Tr. 217, 340-341). Most of the remaining sand was not sold in the market but was used by Coats to make concrete which he sold (Tr. 358-359). That concrete sold for approximately $60.00 per cubic yard, which is an ordinary price for concrete (Tr. 349).

The average price for the few sales of Rainbow concrete sand was approximately $15.60 per cubic yard (Tr. 355, Ex. G-23). The price of concrete sand from competing sand pits varied within a range of $6.00 to $15.60 per cubic yard, not only among the pits, but for each individual pit depending upon the customer and date of sale (Ex. G-23; Tr. 454, 459). Also, Coats operated seven or eight other sand and gravel pits, processed the sand from all of his pits, including the Rainbow pit, at the same location, and sold all of the sand for the same price (Tr. 346, 351, 358). In other words, the Rainbow concrete sand does not command a higher price than the price of other concrete sands.

The price data for the Rainbow mason sand is similar. Rothbard contends that the mason sand sold for $24.00 per cubic yard, but only one or two sales were made at this price (Ex. G-24). Many more sales of mason sand were made at approximately $15.00 per cubic yard (Tr. 392, Ex. G-24). This data is consistent with the fact Coats informed Capps that the mason sand sold for $15.00 per cubic yard (Ex. G-23). This price falls within the range of prices for competing mason sands: $6.00 to $20.50 (Ex. G-23). Also, as

previously mentioned, Coats sold all of his sands for the same price. Thus, the Rainbow mason sand does not command a higher price than the price of other mason sands.

With regard to costs of mining and processing the Rainbow sand, Capps noted that the costs for the Rainbow deposit would be different than the costs for other sand deposits:

> [T]here is nothing different from the mining method used by Mr. Coats from any other operation producing sand and gravel in the La Pine, Bend, Tumolo, and Redmond area. All have overburden to be stripped, stockpiled, and replaced for reclamation. Mr. Coats uses a bulldozer to excavate the sand into long stockpiles, where other operators frequently use excavators to load directly into trucks to haul to the plant. Mr. Coats also hauls the sand and gravel 27 miles to his processing plant, while other operators haul is normally within 2 miles. In addition, Mr. Coats operation includes a front end loader to load his trucks. One distinct disadvantage to mining the Rainbow claims is the high water table. The high water table limits the production to the upper six feet of gravel. While the deposit is much thicker than six feet, he cannot mine it because the water quickly fills in behind the dozer as he removes the upper six feet * * *. [T]he sand mined from La Pine [(the Rainbow sand)] will require processing including screening and washing like most other sources in the Deschutes County area.

(Ex. G-8 at 40, 44).

The evidence amply supports Capp's conclusions. Some of the purported cost advantages of mining the Rainbow deposit have been previously addressed and found to be nonexistent.

Another purported cost advantage was asserted by Coats. He opined that the Rainbow sand is less costly to wash because of the paucity of deleterious materials and the heaviness of the sand from which lightweight materials are easily washed out (Tr. 317, 321, 324, 345). But the factual premise for his opinion is belied by the evidence. Contrary to the testimony of Coats, the Rainbow sand's specific gravity falls in the normal range for sand (Tr. 411, Ex. G-22) and is lower that the specific gravity for the sand of its competitor, Bend Aggregate (Tr. 159, Ex. G-10). Also, as set forth above, the Rainbow sand contains more deleterious materials than the black sand found throughout the La Pine Basin.

Moreover, Coats failed to provide either the specific costs of washing the Rainbow sands or comparative costs of washing other sands. He did identify the total costs for excavation, hauling, and processing at $6.00 per cubic yard (Tr. 327), but he did not compare his costs to similar costs for other deposits. The only other costs discussed were the costs of the Horse Ridge deposit, which, as previously noted, was not a suitable subject for comparison.

The sample evidence conclusively shows that the black sand throughout the La Pine Basin is similar, if not superior, to the Rainbow Sand. Thus, the mining and processing costs would be similar.

In conclusion, Rothbard failed to meet his burden of showing that the Rainbow deposit has a distinct and special value. The Rainbow sand is used for ordinary purposes, does not command a higher price, and is not less costly to mine and process.

Conclusion

Based upon the foregoing, the contested mining claims are hereby declared null and void.

John R. Rampton, Jr.
District Chief
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures.)

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